84-325



IN THE

# Supreme Court of the United States

October Term, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
*Appellant*

v.

COMMONWEALTH OF MASSACHUSETTS
*Appellee*

---

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

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## BRIEF *AMICUS CURIAE* OF THE AMERICAN CHIROPRACTIC ASSOCIATION IN SUPPORT OF THE APPELLEE

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## QUESTION PRESENTED

Whether, *as a threshold question,* the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1101 *et seq.* (ERISA) unconstitutionally preempts a Massachusetts statute which mandates inclusion of minimum mental health care benefits in all health and accident insurance policies covering the State's residents.

The narrow constitutional issue here is whether the Ninth and Tenth Amendments are limitations on Congress' powers under the Commerce Clause with respect to a preemption clause in a Federal statute which in other respects may be within Congress's constitutional power to regulate interstate commerce in insurance.

Because "the Constitutionality of an Act of Congress is drawn in question ...", 24 U.S.C. §2403(a) may be applicable.

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---

## BRIEF *AMICUS CURIAE* OF THE American Chiropractic Association

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This case presents a fundamental question involving the constitutional structure of the American Republic:

-whether Constitutional Federalism, through shared and concurrent Federal and State power, is protected as a means of coping with an urgent social and economic crisis for State and local governments and their residents, or

-whether, in the absence of any showing of supervening national necessity or emergency, a centralist government which forbids States to experiment with various solutions to this crisis can supercede Constitutional Federalism.

## INTEREST OF AMICUS

The American Chiropractic Association is the largest professional chiropractic association in the United States, with members in all 50 states who are licensed as chiropractors by their respective States. Chiropractic is a licensed health profession in all 50 States.

Chiropractors are defined by Congress as "physicians" authorized to provide health care in Medicare, Medicaid, the Federal Employees Compensation Act, the Federal Longshoremen's and Harborworkers' compensation program, and the cooperative Federal/State Vocational Rehabilitation program. The U.S. Department of Education has officially recognized a chiropractic agency to accredit chiropractic colleges.

Chiropractic health care is also a benefit in many private commercial health insurance programs and labor-management health programs. At least 35 States have enacted statutes which require inclusion of chiropractic health care in all commercial health insurance applicable to their local citizens and residents. See Brief *Amicus* of Health Insurance Association of America, Appendices IIB and III.

If ERISA may constitutionally preempt this State's mandatory mental health benefits, presumably the same rule would apply to the 35 States which mandate chiropractic health care, a result which would be a serious detriment to the multiple thousands of *Amicus'* members and to their millions of patients. *Amicus* has a major interest in the outcome of this case, as do the patients of its members whose health would be jeopardized by such Federal preemption.



## SUMMARY OF ARGUMENT

This Court is faced with a critical and unresolved threshold problem of Constitutional Federalism. This Court has never decided the threshold question whether ERISA's preemption provision is an unconstitutional abridgement of the rights reserved to the States under the Tenth Amendment and of the rights retained by the American people under the Ninth and Tenth Amendments. All prior cases in this Court and in the lower courts dealing with ERISA's preemption were decided solely on grounds of statutory construction. The threshold constitutional question has not been raised by the parties and was not briefed and argued to the Court in those prior cases. This threshold issue must be settled first.

The Tenth Amendment is an independent constitutional restriction on Congress' power under the Commerce Clause. It is the fundamental protection of the Bill of Rights for Constitutional Federalism which guards the American people against a would-be all-powerful centralized government.

*Amicus* does not question Congress' power to regulate insurance under the Commerce Clause, but respectfully submits that *with respect to the very narrow issue of preemption*, Congress' powers under the Commerce Clause are limited by the Ninth and Tenth Amendments. On the record before the Court, the preemption provision is an unconstitutional and impermissible abridgement of Constitutional Federalism.

Since there is a total absence of any record showing of a national emergency of crisis, in carrying out its obligation of balancing independent and conflicting constitutional provisions the Court should affirm the

decision below not on the ground of statutory interpretation but on the basis that, with the record before it, ERISA's preemption is unconstitutional under the NINTH and TENTH Amendments.

## ARGUMENT

### THRESHOLD ISSUE: TENTH AMENDMENT'S PRESERVATION OF CONSTITUTIONAL FEDERALISM HAS BEEN COMPLETELY IGNORED BY BRIEFS AND COURT BELOW

The parties and the court below erroneously treated this case solely as one of statutory interpretation, thereby ignoring the fundamental threshold issue whether the Ninth and Tenth Amendments bar ERISA's preemption provision. That threshold question must be settled "before going further."[1]

This Court has not heretofore been squarely presented with the question of constitutionality of ERISA's preemption clause under the Tenth Amendment. In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) and *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983), as well as in *Wadsworth v. Whaland*, 562 F.2d 70 (1977), *cert. den.* 435 U.S. 980, there was absolutely no discussion of the Tenth Amendment in the Briefs, or by the Court. The decisions went off on statutory interpretation, except for an occasional passing reference to the Supremacy Clause.

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[1]Wilson v. New, 243 U.S. 332, 334 (1917). See United States v. California State Water Resources, 694 F.2d 1171, 1175 (9th Cir. 1982).



In *Hopkins Federal S. & L. Ass'n. v. Cleary*, 296 U.S. 315 (1935), Cardozo said for the Court:

> "...nowhere here in the record did the defendant invoke the Tenth Amendment. We cannot accept it as determining the constitutional rights ... least of all when it appears that constitutional rights and privileges were not involved or argued" (at 432-3)[2]

Therefore, the rulings in such prior cases are not dispositive of the threshold question of constitutionality under a constitutional system of governence by limited authority, "...no more power than was absolutely necessary for an efficient central government."[3]

A major social and economic crisis now facing the American people is the capacity of local and state governments to assure their people, *in their local communities*, of adequate comprehensive health care at a reasonable and affordable cost. The extraordinary genius of the Constitution and the Bill of Rights is adaptability to the problems of successive generations of Americans. The appellee, in common with virtually all of the States, is experimenting with solutions to this peoples' crisis in health care arrangements. Federal preemption would foreclose such flexibility in the Federal system.

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[2]In oral argument before the Court in Oklahoma v. Woodring, 309 U.S. 623 mem. (1940), neither the parties nor the Court even mentioned the Tenth Amendment. Transcript of Proceedings, Jan. 29, 1940, vol. 1 and 2.

[3]Former Solicitor General Wade H. McCree, Jr., Civil Liberties and Limited Government, 64 NATIONAL FORUM 39 (Fall 1984).

Throughout our national history, Constitutional Federalism has been the energizing engine for State experimentation, sanctioned by concurrent exercise of Federal and State power. Justice Connor well described this historical role of the States as laboratories for developing new social, economic and political ideas.[4] This same pattern was followed by the Congress in the 98th Congress, by providing for cost-containment of hospitalization, through adopting a mechanism developed in New Jersey.[5]

By limiting consideration solely to statutory construction, the parties as well as the Court below have missed the threshold issue of the Tenth Amendment's role in preserving Constitutional Federalism. The instant case is classic on this constitutional issue. This Court must face the issue at the outset.

## ERISA'S PREEMPTION PROVISION IS UNCONSTITUTIONAL UNDER TENTH AMENDMENT

Under the Tenth Amendment, the Federal Government may not constitutionally preempt the Massachusetts statute here involved.

This Court has held that under the Tenth Amendment "powers not granted are prohibited." *United States v. Butler*, 297 U.S. 1,68 (1936). See also *The Collector v. Day*, 78 U.S. 113 (11 Wall.) 124 (1870). Madison, the sponsor of the Tenth Amendment in 1791, said: "If the power was not granted, Congress may not exercise it."[6] George Washington wrote to

[4]Dissenting. Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 743, 788-9 (1982) and her copious citation of cases and authority.

[5]P.L. 98-21, Sec. 601-607 (1983); 1983 C.Q. Almanac, 391 at 393.

[6]II Annals of Congress, 1857 (1791).



Lafayette that "...the people evidently retained everything which they did not in express terms give up."[7]

The grant of power to Congress by the Constitution was also a limitation of power.[8]

This doctrine has been recognized from the earliest days. In *McCulloch v. Maryland*, 17 U.S. 316 (4 Wheat. 579) (1819), Chief Justice Marshall stated the following prophetic words:

> "This government is ... one of enumerated powers. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist." (at 405).

*Amicus* raises the question of the Tenth Amendment's limitation on the Commerce Clause. The Commerce Clause does not specifically vest exclusive power in the Federal Government. Chief Justice Burger ruled that the same was true of the Copyright Clause.[9] The Founders knew how to provide exclusive jurisdiction when they intended to do so.[10]

[7]29 THE WRITINGS OF GEO. WASHINGTON 478 (Fitzpatrick ed. 1939).

[8]See Graham v. John Deere Co., 383 U.S. 1, 5-6 (1966). ("The [patent] clause is both a grant of power and a limitation.")

[9]Goldstein v. California, 412 U.S. 546, 553 (1973).

[10]The House has "sole power of impeachment," ART. I, Sec. 2, but the Senate has "sole power to try all impeachment," ART I, Sec. 3, "All Bills raising Revenue shall originate in the House of Representatives," ART. I, Sec. 7. Congress shall have exclusive jursidiction over the District of Columbia, Art. I, Sec. 8.

It is established doctrine enunciated by Chief Justice Taney, that legislation beyond the authority of the Congress under the Ninth and Tenth Amendments does not come within the protection of the Supremacy Clause.[11]

*Amicus* raises no question as to Congress' constitutional power to regulate insurance. But because of the Tenth Amendment such right does not include Federal preemption of State statutes mandating specific health services in health and accident policies covering their residents. "The existence of a permissible purpose cannot sustain an action that has an impermissible effect."[12] The permissible purpose here is regulation of insurance, the impermissible effect is Federal preemption in the circumstances of this record.

ERISA's preemption provision conflicts with the Tenth Amendment and cannot negate the operation of the Massachusetts statute.[13]

## TENTH AMENDMENT IS AN INDEPENDENT LIMITATION ON CONGRESS' POWERS

In *Kansas v. Colorado,* 206 U.S. 46, 90-1 (1907) the Court said:

> "This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning ...",

[11]Gordon v. United States, 117 U.S. 697, 705 (1864).

[12]Wright v. Council of the City of Emporia, 407 U.S. 451, 462 (1972).

[13]See Marbury v. Madison, 1 Cranch 137 (1803): Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).



which the Court stated to be a limitation on an "attempt to exercise power which had not been granted." The Court stated that the Tenth Amendment was an "express limitation on the powers of Congress."

*Hopkins Federal S. and L. Assn. v. Cleary, supra* at 335-6, held an Act of Congress "unconstitutional encroachment upon the reserved powers of the States. United States Constitution Art. X":

> "The power of the Congress in the premises...being not exclusive, but at most concurrent...we are constrained to the holding that there has been an illegitimate encroachment by the government of the Nation upon a domain of activity set apart by the Constitution as the province of the states...(at 338)[14]

It is especially significant in this connection that in a brief for the United States (at pp. 59-60), Solicitor General Robert H. Jackson (later, Justice of this Court) in *United States v. Bekins,* 304 U.S. 27 (1938), advised this Court that its opinion in *Hopkins*

> "appears to view this conclusion as based upon the Tenth Amendment, independently of the scope of powers granted to the United States (pp. 335, 336).

This same conclusion, Jackson said, was buttressed by five other decisions of this Court.[15]

[14]U.S. v. Darby, 312 U.S. 100, 122-4 (1941) is dicta and is not dispositive since the Court's opinion specifically states that it was deciding the case only on the basis of the Fifth Amendment and purely as a matter of statutory construction (112).

[15]U.S. v. Butler, 297 U.S. 1, 68 (1936); Ashton v. Cameron County Water District, No. One, 298 U.S. 513, 527, 331 (1936); Steward Machine Co. v. Davis 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937); Cincinnati Soap Co. v. United States, 301 U.S. 308 (1937).

Another long line of cases is to the same effect, that the Tenth Amendment is an independent, affirmative limitation on the Congress, including actions based on the Commerce Clause.[16]

Still another line of cases also leads to the same conclusion. The Constitution is "...one instrument, all of whose provisions are to be deemed of equal validity."[17] Therefore, the Tenth Amendment must be applied "with equal validity" to the Commerce Clause.[18]

Even the most precise Constitutional authorizations to Congress, such as the bankruptcy power, are subject to the Bill of Rights. This Court ruled that "the bankruptcy power, like the other great substantive

[16]Standard Oil Co. of California v. Agsalud, 442 F. Supp. 695, 710 ("The Tenth Amendment imposes substantial limitations on Congress' power under the Commerce Clause"), *aff'd.* 633 F. 2d 760 (9th Cir. 1980), *aff'd. without opinion*, 454 U.S. 801 (1981); Gold Cross Ambulance v. City of Kansas City, 538 F. Supp. 956 (W.D. Mo., W.D., 1982), *aff'd.* 705 F.2d 1005 (8th Cir. 1983); Brown v. Brannon, 399 F. Supp. 133, 147 *et. seq* (M.D. No. Car., Durham Div., 1975), aff'd *without opinion* 535 F.2d 1249 (4th Cir. 1976); EEOC v. Ferris State College, 493 F. Supp. 707, 712 (W.D. Mich. SD, 1980); Marshall v. Del. River and Bay Authority, 471 F. Supp. 886, 891 (D.De. 1979); Carpenter v. Pennsylvania, 508 F. Supp. 148, 149 (E.D. Penna. 1981). But see Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294 (N.D. Calif, 1977), *aff'd* 571 F.2d 502 (9th Cir., 1978), *cert. den.* 439 U.S. 831 (1978); United States v. Bally Mfg. Corp., 345 F. Supp. 410, 423 (ED. La. 1972).

[17]Prout v. Starr, 188 U.S. 537, 543 (1903).

[18]The Constitution was ratified in 1788, and the first ten amendments were ratified in 1791. Dowling and Gunther, Consititutional Law 10 (1965).



powers of the Congress, is subject to the Fifth Amendment."[19]

As to the Ninth and Tenth Amendments, "a careful reading of the words and history ... indicates that they were intended to play a role in our constitutional scheme."[20] They can have meaning only if implemented to restrict the Federal Government. Administrative convenience or legislative tidiness cannot justify unconstitutional Federal action as this Court indicated in the legislative veto case, for example.[21]

The balancing of various constitutional provisisons is a common judicial experience,[22] as true of the Tenth

[19]Louisville Joint State Land Bank v. Radford, 295 U.S. 555, 589 (1935). The quoted portion in the text is followed by the following footnote in the Court's opinion:

> "[19]For instance, the war power, *Ex parte Milligan*, 4 Wall. 2, 119: *Ochoa v. Hernandez*, 230 U.S. 139, 153-4; *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 155. The power to tax, *United States v. Railroad Co.*, 17 Wall. 322; *Boyd v. United States*, 116 U.S. 616; *Nichols v. Coolidge*, 274 U.S. 531, 542; *Blodgett v. Holden*, 275 U.S. 142, 147; *Barclay & Co. v. Edwards*, 267 U.S. 442, 450, *Heiner v. Donnan*, 285 U.S. 312, 326. The power to regulate commerce, *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 571; *Carroll v. Greenwich Insurance Co.*, 199 U.S. 401, 410; *United States v. Lynah*, 188 U.S. 445, 471; *United States v. Cress*, 243 U.S. 316, 326. The power to exclude aliens, *Wong Wing v. United States*, 163 U.S. 228, 236, 237-8. Compare *Perry v. United States*, 294 U.S. 330."

[20]Redlich, *Are there "Certain Rights...Retained by the People"?*, 37 N.Y.U.L. Rev. 787, 804-5 (1982).

[21]I.N.S. v. Chadha, 103 S.Ct. 2764, 2780-1 (1983)

[22]Peel v. Florida Dept. of Transportation, 600 F.2d 1070, 1084 (5th Cir. 1979) (Tenth Amendment and War Powers). See, e.g., Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); California v. LaRue, 409 U.S. 109, 115 (1972).

Amendment as of any other constitutional provisions. The judicial task of reconciling and accomodating seemingly conflicting constitutional provisions is well described as follows:

> "A person has the right not to have government act where it lacks power. In addition, he has other rights, which deny government power to act where otherwise it might. For example, the government has the power to regulate bankruptcy proccedings [U.S. Constitution, Art. 1, Section 8], but it lacks power to regulate them in such a way that a property owner is deprived of property without due process of law [*Louisville Bank v. Radford,* 295 U.S. 555 (1935)]. Though government has the power to preserve its own existence [*Dennis v. U.S.,* 341 U.S. 494, 501 (1951)], that power is tempered by the rights guaranteed by the first and fifth amendments [*Aptheker v. Secretary of State,* 378 U.S. 500 (1964)]. Similarly, where a person has an inherent right, recognized by the ninth amendment, it protects him against some exercise of power which might otherwise be proper ... It is in areas where government has power to act that it is important to the individual to have positive rights."[23]

These "positive rights" come within what Justice Douglas, for the Court in *Griswold,* called "penumbras, formed by emanations from those [Bill of Rights] guaranties that help give them life and substance."[24]

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[23]Comment, "The Ninth Amendment," 30 ALBANY L. REV. 89, 99 (1966).

[24]Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (specifically referring to the Ninth Amendment as an example).



The Bill of Rights (including the Ninth and Tenth Amendments) has a special place and role in American constitutional interpretation, sedulously protected by this Court,[25] and guarded "with a jealous eye."[26] A liberal interpretation of such rights has been called "the only conclusion supported by history."[27]

In the instant case, the penumbra of the Tenth Amendment constitutionally authorize Massachusetts to determine what health benefits shall be provided to its residents under commercial health insurance policies, without hindrance by Federal preemption.

**Federal Power in a True Emergency**

Since constitutional interpretation involves balancing constitutional provisions,[28] the independent status of the Tenth Amendment as a restriction on Congress' powers need not prevent the Federal Government from acting where a true emergency requires national action. Justice Black analyzed the symbiotic relationship between the States and the central government as follows:

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[25]See, for example, Louisville Joint Stock Land Bank v. Radford, *supra* n. 19. Cf: Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 151 (1963).

[26]A.F. of L. v. Swing, 312 U.S. 321, 325 (1941).

[27]Bridges v. California, 314 U.S. 252, 263, 265 (1941). See also Olmsted v. United States, 277 U.S. 438, at 471, 476 (1928).

[28]See Justice Blackmun's comment, concurring in National League of Cities v. Usery, 426 U.S. 833, 856 (1976); Peel v. Fla. Dept., *supra* n. 22 at 1084 and note 10.

> "The concept [of Federalism] does not mean blind deference to 'State Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate interests of the States."[29]

Black's interpretation was cited with approval by Justice Connor, Chief Justice Burger and Justice Rehnquist.[30]

In *Steward Machine Co. v. Davis, supra* n. 15, dealing with the Federal Unemployment Compensation Act of 1935, the United States argued that the Nation was faced with a "problem which threatened the peace and solvency of local government, of the state governments, and of the national government." (p. 567). In balancing the constitutional provisions involved, the Court referred to a "crisis so extreme" (586) that it sent unemployment to "unprecedented

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[29]Younger v. Harris, 401 U.S. 37, 44 (1971).

[30]FERC v. Mississippi, 456 U.S. 742, at 796-7 (1983) (dissenting.)



heights", with a problem which "had become national in area and dimensions" thus presenting an "urgent need for some remedial expedient" (586-7).[31]

In contrast, however, in the record before the Court here, there is no showing whatsoever of any national emergency which threatens the Nation, the States or the national government. There is no constitutional basis, therefore, for balancing against the Tenth Amendment's full scope.

Does such a balancing in favor of the Tenth Amendment leave untidy constitutional or governmental edges in the exercise of power? Justice Cardozo dealt with such a problem:

> "In ruling as we do, we must leave many questions open ... Enough for the present purposes that wherever the line may be, this statute is within it. Definitions more precise must abide the wisdom of the future."[32]

This Court described ERISA's clause as a "virtually unique preemption provision."[33] In this light, it is well

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[31]See also Atchison Ry Co. v. United States, 284 U.S. 248 (1932); Home B. & L. Ass'n v. Blaisdell, 290 U.S. 398, 426, 444 (1934); National League of Cities v. Usery, *supra* n. 28, at 853; Allied Structural Steel Co. v. Spannous, 438 U.S. 234, 249 (1978).

[32]Steward Machine Co. v. Davis, *supra* n. 15, at 590. See also Kansas v. Colorado, 206 U.S. 47, 93 (1907).

[33]Franchise Tax Board v. Construction Laborers' Vacation Trust, 102 S. Ct. 2841, n. 26 (1983), cited with approval by Justice Connor (the Chief Justice and Rehnquist, J. concurring) in Shaw v. Delta Air Lines, 103 S. Ct., 2890, 3900 at *fn* 15 (1983), dissenting.

to heed the scholarly warning against "the futility of seeking to transfer generalizations from one area of regulation to another."[31] Another scholarly comment is also relevant: "a restriction on preemption in one particular field [of ERISA] may not by itself undermine the effectiveness of ERISA."[35]

Absent the most compelling reasons, which are wholly lacking in the record here, the Tenth Amendment is a limitation on the Commerce Clause and ERISA's preemption clause. "Enough for the present," as Cardozo advised.

This Court has recognized the nonfungibility of constitutional rulings because of factual differences in the cases. For example, the colloquy on oral argument by Solicitor General (later, Justice) Jackson in *State of Oklahoma v. Woodring:*

> "Mr. Jackson, Your Honors upheld the Social Security Act.
>
> The Chief Justice. I know. That is a special story on its own facts..."[36]

In a true emergency, Federal power can be effectively exercised as "a special story on its own facts" in the balancing of various constitutional provisions.

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[34]Hutchinson and Ifshin, Federal Preemption of State Law Under ERISA, 46 U. CHI. L. REV. 23, 80 (1978). This article was cited with approval in Shaw v. Delta Air Lines, 103 S. Ct. at 2901 note 19.

[35]Lockhart, Kamisar and Choper, Constitutional Law, Cases-Comments-Questions (1975, 4th ed.), 404.

[36]309 U.S. 623 (1940), Transcript of Proceedings, Jan. 29, 1940, Vol. 1, p. 81.



## SYNERGISTIC EFFECT OF NINTH AMENDMENT

The constitutional impact of the Tenth Amendment, with its reservation of undelegated powers to the States "or to the People", is augmented and complemented in the instant case by the Ninth Amendment which provides for the retention of unenumerated powers "by the people". In *Kansas v. Colorado, supra,* the Court said that the principal purpose of the Tenth Amendment "was not a distribution of power between the United States and the States but a reservation to the people of all powers not granted."

The reach of both the Ninth and Tenth Amendments begins from the limited and non-exclusive grant of power of Congress in the Commerce Clause. Under the Ninth Amendment, "rights may arise or appear by reason of limitations placed upon or by limits of granted powers."[37]

In exercising its constitutional concurrent and shared power with the Federal Government, a State acting *in loco parentis* in behalf of its residents to assure them of comprehensive health care coverage in their health insurance policies, activates both peoples' reserved power under the Ninth Amendment[38] and their retained power under the Tenth, "for protection of individual liberty from infringements..."[39] from the Federal Government.

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[37]Kelsey, "The Ninth Amendment of the Federal Constitution," 11 IND. L. J. 309, 311 (1936).

[38]See concurring opinion of Justice Goldberg, the Chief Justice and Justice Brennan, Griswold v. Connecticut, *supra* n. 24, at 488, 492-4 (1965).

[39]Redlich, *supra* n. 20, at 808.

*Amicus* respectfully submits that the combined effect of the Ninth and Tenth Amendments constitutionally immunizes the statute of Massachusetts, acting in *loco parentis* for its "people", from preemption by the Federal ERISA statute. Notwithstanding the Commerce Clause, the rights sought to be protected by the State here come within what the Court, specifically mentioning the Ninth Amendment, called "...penumbras, formed by emanations from those [Bill of Rights] guaranties that help give them life and substance."[40]

## CONCURRENT AND SHARED FEDERAL AND STATE POWER

There is no factual justification in the record for any constitutional claim of need for uniformity in connection with ERISA's preemption. The Commerce Clause contains no express authority for uniformity. When the Framers intended to authorize or madante uniformity, they did so in clear and specific terms. For example, in the Naturalization and Bankruptcies Clause, ART I, Section 8, Clause 4, the Constitution authorized Congress

> "To establish an *uniform* Rule of Naturalization, and *uniform* Laws on the subject of Bankruptcies throughout the United States." (emphasis added)[41]

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[40]Griswold, *supra* n. 24, at 484.

[41]Corwin, The Constitution (1953), 263. ("In the exercise of its bankruptcy powers Congress must not transgress the Fifth and Tenth Amendments.")



In the clause on duties, imports and excises, the Constitution mandates that they "shall be uniform throughout the United States", ART, I Sec. 3, Cl. 1..

Constitutional authorization for exclusive power was specific in the language of ART. I, Section 8, Clause 17, in connection with all cases whatsoever over the District of Columbia as the seat of the Federal Government. Likewise, "the sole power of impeachment" was given to the House of Representatives, ART. I, Sec. 2, Clause 5, and "the sole power to try all impeachments" to the Senate, ART. I, Sec 3, Clause 6.

Not only is there no showing anywhere in the record of a need that would "require exclusive jurisdiction by Congress'[42] but on the contrary Congress itself made it clear that there was no need for one uniform system in ERISA, by enacting a whole host of statutory exemptions and exceptions.[43]

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[42]Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851).

[43]Preemption does not apply to (1) any state law which "regulates insurance, banking, or securities," 29 U.S.C. 1144 (b) (2) (A); (2) to "any law of the United States," 1144 (d); (3) to any employee benefit plan established solely to comply with applicable workers' compensation laws, unemployment compensation laws, or disability insurance laws, 1003(b) (3); (4) to any plan established primarily to provide death benefits, 1144 (b)(2)(B); (5) to "any generally applicable criminal law of a State," 1144 (b) (4); (6) to "a governmental plan," "a church plan," and "an excess benefit plan," 1003(b); (7) to Hawaii's Prepaid Health Care Act, 1144 (6) (A); and (8) to certain multiple employer welfare arrangements, 1144 (6) (A) and (B). In addition, ERISA is inapplicable to state fair employment laws, Bucyrus-Erie Co. v. Department, 599 F.2d 205 (7th Cir., 1978).

Constitutional denial to Congress of exclusive authority or of a mandate for uniformity under the Commerce Clause, plus the absence of any showing of emergency requiring national preemptive power here, highlights the existence of constitutionally permissible concurrent State authority in areas where power is granted to Congress.

Such concurrent exercise of powers by States and the Federal Government is neither unique nor unusual. Despite the Copyright Clause's grant of power to the Congress, this Courts's first significant copyright decision sanctioned the concurrent exercise by States of "common law" copyright for unpublished works and by the Federal Government of statutory copyright for published works.[44] The Court has ruled that the copyright grant to Congress was not by its terms an "exclusive" grant,[45] thereby validating the constitutionality of concurrent Federal and State authority in a field where the Constitution specifically granted power to Congress.[46]

The rationale for the exercise of concurrent Federal and State power under the Constitution was clearly stated by Chief Justice Burger: "...our nation is simply too big and too diverse" for the Court to require a single national "community" standard[47] This

[44]Wheaton v. Peters, 33 U.S. (8 Peters) 591 (1834).

[45]Goldstein v. California, supra, n. 9.

[46]See NIMMER ON COPYRIGHT, Sec. 1.01 (B).

[47]Miller v. California, 413 U.S. 15, 30 (1973).



rationale applies equally to bar a Federal effort to establish a single national standard for what health benefits should or should not be required by all States in health or accident insurance covering their residents. The States have a constitutionally protected power to deal with the health and the physical and mental well-being of their residents without Federal preemption.

The Ninth and Tenth Amendments prescribe a governmental structure of concurrent and shared powers between the States and Federal Government. Power sharing inevitably leads to conflicts. Many such conflicts (as, for example, those between individual rights and the national interest or those between State and Federal rights) are contained within, and contemplated by, the Constitution. The Framers consciously left the conflicts to be resolved on a circumstance-by-circumstance basis responsive to the political and public policy views of the American people at any given moment in our history.[48]

[48]A distinguished legal philosopher said:

> "The most important issues that come before the Supreme Court are not questions of well-settled law but concern issues of public policy about which well-informed and well-disposed people differ."

Morris R. Cohen, Faith of a Liberal (1946) 180.

As a flexible charter designed for the future of a free people, the Constitution deliberately preserved such constructive tensions among concurrent power sources as a safety valve to guarantee that the National Government would be one of limited powers. The special, unique role of the Bill of Rights is to serve as a brake against forces, however well-meaning, which might jeopardize the rights of free people.

To this Court the Constitution delegated the delicate task of balancing rights in such conflicts between concurrent and often opposing power sources, in order to assure that they do not overreach their constitutionally intended and permissible boundaries.

Under this record, the Massachusetts statute under review has constitutional protection under the Ninth and Tenth Amendments against ERISA preemption.



## CONCLUSION

The Court should affirm the decision below, specifically on the basis of the threshold issue that the Ninth and Tenth Amendments render ERISA's preemption provision unconstitutional.

Respectfully submitted,

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